

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 7163

DATE COMPLAINT FILED: October 25, 2016

DATES OF NOTIFICATION: November 1, 2016

LAST RESPONSE RECEIVED: January 17, 2017

DATE ACTIVATED: June 8, 2017

EXPIRATION OF SOL: October 24, 2021

ELECTION CYCLE: 2016

COMPLAINANT:

Tuckerman Babcock, Chairman
Alaska Republican Party

RESPONDENTS:

Citizens for Joe Miller and Thomas John Nelson
in his official capacity as treasurer
Joe Miller
Restoring Liberty, LLC

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30101(9)(B)(i)
52 U.S.C. § 30104(b)
52 U.S.C. § 30116(a)(7)(B)(iii)
52 U.S.C. § 30118(a)
11 C.F.R. § 100.73
11 C.F.R. § 100.132
11 C.F.R. § 109.23(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Senate candidate Joe Miller; his authorized committee, Citizens for Joe Miller and Thomas John Nelson in his official capacity as treasurer ("the Committee"); and Restoring Liberty, LLC, a Subchapter S corporation Miller owns, violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations by making or accepting prohibited corporate contributions, failing to include appropriate

1 disclaimers on solicitations and campaign materials, failing to report various receipts and
2 expenditures, and fabricating in-kind contributions. Given the specific circumstances of this
3 matter, as discussed below, we recommend that the Commission dismiss the allegations that
4 Miller, the Committee, and Restoring Liberty violated the Act.

5 II. FACTUAL BACKGROUND

6 During the 2016 election cycle, Joe Miller was the Libertarian candidate for the Senate in
7 Alaska, and Citizens for Joe Miller was his principal campaign committee. Miller announced his
8 candidacy on September 6, 2016, after the previous Libertarian candidate for Senate withdrew.¹
9 Restoring Liberty, LLC is a limited liability company registered as a Subchapter S corporation,
10 and Miller is its sole owner.² Restoring Liberty, LLC operates a website also called Restoring
11 Liberty, which posts articles and commentary on U.S. and Alaska politics, as well as other
12 news.³ The domain names www.restoringliberty.us and www.joemiller.us both navigate to the
13 Restoring Liberty website.⁴ Miller's campaign website was www.joeforliberty.com.⁵

14 The Complaint alleges that Restoring Liberty made illegal corporate contributions to the
15 Committee in four ways. First, it alleges that the Restoring Liberty website was a "de facto"
16 campaign website for Miller and thus all costs related to it were in-kind contributions to the
17 Committee.⁶ In support, it points to numerous Committee press releases, pro-Miller articles, and

1 Response at 3 (Jan. 13, 2017).

2 Resp. at 4, Ex. A ¶ 4; Complaint at 2 (Oct. 25, 2016).

3 Resp. at 5.

4 *Id.*

5 *Id.*

6 Compl. at 2.

1 op-eds Miller wrote that were posted on that website.⁷ Second, the Complaint alleges that the
2 Restoring Liberty website and its Facebook and Twitter accounts contained links to the
3 Committee's website, and thus were also contributions from Restoring Liberty, LLC.⁸ Third, the
4 Complaint alleges that payments Restoring Liberty received from its corporate sponsors resulted
5 in corporate contributions to the Committee.⁹ Finally, the Complaint contends that the
6 Committee used Restoring Liberty's email list to solicit donations for the Committee.¹⁰ The
7 Complaint alleges that at least one email endorsing Miller and advocating for the defeat of his
8 opponent was sent from a Restoring Liberty email account.¹¹

9 The Complaint also alleges that the Committee failed to include proper disclaimers on
10 Miller's YouTube page, campaign signs, radio ads, and "other materials."¹² In support, the
11 Complaint attaches a picture of a Committee yard sign, although it does not include information
12 about the radio ads or "other materials."¹³ The Complaint states that disclaimers on Miller's
13 internet solicitations were either incorrect or missing entirely.¹⁴

14 Finally, the Complaint alleges a variety of reporting violations. It alleges that the
15 Committee did not report in-kind contributions for the use of the Committee's campaign

⁷ *Id.* at Exs. C, K.

⁸ *Id.* at 2.

⁹ *Id.* at 2-3. The Complaint includes a screenshot of Restoring Liberty's sponsor page, and the three corporate sponsors each appear to be local businesses. *See id.* at Ex. D.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3, Ex. H.

¹² *Id.* at 2-3.

¹³ *Id.* at 3-4, Ex. J. The yard sign attached as an exhibit appears to contain a disclaimer stating it was paid for by Joe Miller for U.S. Senate, which was Miller's 2010 committee when he was the Republican candidate for Senate in Alaska.

¹⁴ *Id.*

1 headquarters, did not report expenditures for campaign signs and other materials, and inflated the
2 value of Miller's use of his own car to bolster the campaign's receipts. Complainant, who is the
3 chair of the Alaska Republican Party, also alleges that the Committee falsely reported a \$4,500
4 in-kind contribution from the party.

5 The Respondents generally deny the allegations. They claim that no corporate
6 contributions resulted from Restoring Liberty's activities because it is an LLC wholly owned by
7 Miller; so any contributions should be attributed to him as an individual. Further, they assert that
8 Restoring Liberty's coverage of the election falls within the Act's media exemption.¹⁵ In
9 support, the Response identifies several articles it contends show even-handed coverage of
10 Miller's election.¹⁶ Respondents also assert that Miller turned over all editorial control of
11 Restoring Liberty to "a family member" who operated it without direction from Miller or any
12 other Committee staff.¹⁷

13 Respondents also explain some of the alleged in-kind contributions. They acknowledge
14 that Restoring Liberty's website contained an ad for Miller and a link to the Committee's
15 website, but explain that the Committee reported an in-kind contribution of \$500 per month for
16 the ad.¹⁸ As to the allegations regarding the use of Restoring Liberty's Facebook, Twitter, and
17 YouTube accounts, Respondents state that Miller, not Restoring Liberty, owns the accounts, so

¹⁵ Resp. at 4-5.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 5. It is not clear whether the “family member” referenced in the Response is the same person as the “independent contractor.” Respondents claim “has been almost exclusively responsible for the content of the site over the past few years.” *Id.* at 5 n.6.

18 *Id.* at 6.

1 no corporate contributions occurred.¹⁹ They also argue that Commission regulations do not
2 require disclaimers on social media platforms.²⁰ As to the use of Restoring Liberty's email lists,
3 Respondents state that all emails were sent using lists the Committee or Miller owned.²¹

4 In addition, Respondents argue that the Complaint fails to identify any radio ad that
5 lacked a disclaimer.²² Respondents state that the yard sign identified in the Complaint was likely
6 from Miller's 2010 campaign, and the sign's owner must have simply saved and re-used it.²³
7 Respondents acknowledge that one of the Committee's 126 emails included an inadequate
8 disclaimer, but the partial disclaimer showed the Committee was responsible for the email, and
9 the mistake was quickly corrected.²⁴

10 Finally, Respondents state that all of the Committee's receipts were authentic and
11 properly reported.²⁵ With regard to the alleged in-kind contribution from the Alaska Republican
12 Party, Respondents explain that this contribution consisted of unused party brochures from

¹⁹ *Id.* at 8-9. Respondents do not specifically address the allegation that the advertisers on the Restoring Liberty website made corporate contributions to the Committee. The Commission has stated that the payment of advertising space by corporate sponsors in candidate-owned publications may result in prohibited corporate contributions by those corporate sponsors. *See* Advisory Op. 1990-09 (Mueller); Advisory Op. 1990-05 (Mueller). We lack information that indicates the sponsors placed the ads for the purpose of influencing the election. *See* Factual & Legal Analysis at 4-5, MUR 7024 (Van Hollen for Senate) (finding no reason to believe candidate received contributions in the form of *pro bono* legal services to challenge a Commission regulation; explaining that a thing of value given to a campaign is not a "contribution" if it was not for the purpose of influencing a federal election).

²⁰ *Resp.* at 8-9

²¹ *Id.* at 9-10.

²² *Id.* at 9.

²³ *Id.* at 11. The disclaimer stated, "Copyright © 2016 Citizens for Joe Miller....Our mailing address is: Citizens for Joe Miller 250 Cushman St., Suite 2A Fairbanks, AK 99701."

²⁴ *Id.* at 10-11.

²⁵ *Id.* at 12-13.

1 Miller's 2010 campaign, which the Committee repurposed and used, and consequently felt
2 obliged to report.²⁶

3 **III. LEGAL ANALYSIS**

4 **A. Alleged Corporate Contributions**

5 The Act prohibits corporations from making contributions to candidate committees and
6 prohibits those committees from knowingly accepting or receiving such contributions.²⁷ The Act
7 and Commission regulations define "contribution" and "expenditure" to include any gift of
8 money or "anything of value" for the purpose of influencing a federal election.²⁸ The term
9 "anything of value" includes in-kind contributions.²⁹ "Anything of value," however, does not
10 include the provision of goods and services at the usual and normal charge.³⁰

11 Exempt from the definition of "contribution" and "expenditure" is "[a]ny cost incurred in
12 covering or carrying a news story, commentary, or editorial by any... Web site... unless the
13 facility is owned or controlled by any political party, political committee, or candidate[.]"³¹ This
14 exemption is known as the "press exemption" or "media exemption."³² The Commission has
15 extended the press exemption to "media entities that cover or carry news stories, commentary,
16 and editorials on the Internet" as well as "bloggers and others who communicate on the

²⁶ *Id.*

²⁷ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), (d).

²⁸ 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

²⁹ 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

³⁰ *Id.*

³¹ 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

³² Advisory Op. 2010-08 (Citizens United) at 3 ("AO 2010-08").

Internet.”³³ A communication subject to this exemption is also exempt from the Act’s disclosure, disclaimer, and reporting requirements.³⁴

To assess whether the press exemption applies to a communication, the Commission uses a two-part test.³⁵ First, it asks whether the entity engaging in the activity is a “press entity” as described by the Act and regulations.³⁶ Second, if the entity is a press entity, the exemption will apply so long as it (a) is not owned or controlled by a political party, political committee, or candidate, and (b) is acting within its “legitimate press function” in conducting the activity.³⁷ If the press entity is owned or controlled by the candidate, the press exemption only applies for costs of each news story that “represents a *bona fide* news account communicated in a publication of general circulation . . . [t]hat is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area.”³⁸

³³ See *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (hereinafter, *Internet Regulations*); see Advisory Op. 2008-14 (Melothe); Advisory Op. 2005-16 (Fired Up!) (“AO 2005-16”); MUR 6247 (www.examiner.com); MUR 5928 (Kos Media, LLC). The uncompensated Internet activity exemption does not apply since the record indicates that the website is operated by one or more independent contractors who are compensated for their services. *Supra* note 17.

³⁴ AO 2010-08 at 7.

³⁵ *Id.* at 4; AO 2005-16 at 4.

³⁶ AO 2010-08 at 4; AO 2005-16 at 4. The Commission has explained that when determining whether the term “press entity” applies, it “has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.” AO 2010-08 at 7.

³⁷ *Reader's Digest Ass'n, Inc. v. Fed. Election Comm'n*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

³⁸ 11 C.F.R. § 100.73. “[C]ommentaries or editorials contained in candidate-owned or -controlled publications are *not* protected by the press exemption, and absent strong evidence to the contrary, a candidate will be presumed to have received a contribution in-kind to influence his or her election when the candidate’s newspaper or radio station disseminates commentaries or editorials favorable to [the candidate] or unfavorable to [the candidate’s] opponent.” Factual & Legal Analysis at 4, MUR 4305 (Forbes for President) (quotations omitted); see also Advisory Op. 2005-07 (Mayberry).

1 Restoring Liberty, LLC qualifies as a press entity because it operates a website that posts
2 articles and commentaries on a wide range of issues, including politics, and has been doing so
3 continuously since 2011.³⁹ As a press entity owned by a candidate, however, the press
4 exemption only covers *bona fide* news stories on that site that are part of a pattern of campaign-
5 related news that gives reasonably equal coverage to opposing candidates and would not protect
6 commentaries or editorials published on the website.⁴⁰

7 During Miller's eight-week candidacy, from September 6, 2016, through the date of the
8 election, the Alaska News section of the Restoring Liberty website posted 46 articles. Of those,
9 12 were general Alaska news items, 23 were press releases by Joe Miller or the Committee,
10 4 were op-eds written by Miller or endorsing Miller, 5 were news stories covering Miller's
11 candidacy that either portrayed him positively or his opponent negatively, 1 was a neutral article
12 covering Miller's candidacy, and 1 reported the filing of the Complaint in this MUR.

13 Accordingly, the press exemption does not cover commentaries or editorials about the campaign
14 and only covers the news stories if they were part of a pattern of reasonably equal coverage.

15 Respondents' argument that it provided reasonably equal coverage is unconvincing.

16 Although the website did publish articles periodically about Miller's opponent Murkowski over a
17 five-year period, that coverage pales in comparison to the overwhelming number of pro-Miller
18 articles discussed above and the attention Restoring Liberty lavished on Miller during the
19 campaign. Accordingly, the press exemption does not apply to Restoring Liberty's posts in

³⁹ Resp. at 5.

⁴⁰ Factual & Legal Analysis at 4, MUR 4305 (Forbes for President) (quoting Informal Letter 1976-29, CCH ¶ 6907).

1 connection with Miller's campaign, and those posts constituted in-kind contributions from
2 Restoring Liberty to the Committee.⁴¹

3 We also conclude that Restoring Liberty LLC's contributions cannot be attributed to
4 Miller as his own contributions to the campaign because Restoring Liberty opted to be taxed as a
5 Subchapter S corporation under the Internal Revenue Code. For purposes of contribution
6 limitations and prohibitions, an LLC is treated as either a corporation or a partnership. It is
7 treated as a corporation if it has chosen to file as a corporation with the IRS or if it has publicly
8 traded shares.⁴² The Commission has previously treated the undistributed assets of a Subchapter
9 S corporation as corporate in nature for purposes of the Act.⁴³ Therefore, contributions from
10 Restoring Liberty, including the in-kind contributions to the Committee for advertising, were
11 corporate and prohibited.⁴⁴

12 Nonetheless, the particular circumstances of this case support dismissal. Miller's
13 unsuccessful campaign lasted only eight weeks, and based on the content of posts on the
14 Restoring Liberty website, it appears the associated costs were likely small. Given these factors,

⁴¹ See MUR 4305 (Forbes for President).

⁴² 11 C.F.R. § 110.1(g)(3). An LLC is treated as a partnership if it has chosen to file with the IRS as a partnership or if it has made no choice as to whether it is a corporation or a partnership. *Id.* § 110.1(g)(2). Contributions from single member LLCs treated as partnerships are attributed to the single member. *Id.* § 110.1(g)(4).

⁴³ See Statement of Reasons of Comm'rs. Petersen, Bauerly, Hunter & McGahn at 5, MUR 6102 (Oliver for Congress) ("[T]he funds of an S corporation are corporate in nature until they are properly distributed." (citing *United States v. Falcone*, 934 F.2d 1528, 1547-48 (11th Cir. 1991), *reh'g granted and opinion vacated on other grounds*, 939 F.2d 1455 (11th Cir. 1991), *opinion reinstated and reh'g on other grounds*, 960 F.2d 988 (11th Cir. 1992))).

⁴⁴ Additionally, under the Act, the "financing by any person of the . . . republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered an expenditure." 52 U.S.C. § 30116(a)(7)(B)(iii); see also 11 C.F.R. § 109.23(a); Factual & Legal Analysis at 4, MUR 6783 (Indian Americans for Freedom). Therefore, Restoring Liberty's republication of the Committee's press releases resulted in unreported expenditures. However, the Complaint's assertion that the Restoring Liberty was used as a "de facto" campaign website for Miller is factually unsupported because Restoring Liberty posted almost 500 articles covering elections and issues unrelated to Miller during his campaign.

1 pursuing further enforcement action would not be an efficient use of the Commission's
2 resources. Therefore, we recommend that the Commission exercise its prosecutorial discretion
3 and dismiss the allegation that Restoring Liberty, Miller, and the Committee made or received
4 and failed to report prohibited corporate contributions.⁴⁵

5 **B. Other Allegations**

6 Under the Act, a political committee's public communications must contain appropriate
7 disclaimers.⁴⁶ Political committees are required to report its receipts and disbursements.⁴⁷

8 Although the Complaint alleges that the Committee included inadequate disclaimers in
9 radio ads and campaign materials, the only specific campaign communication the Complaint
10 referenced was one yard sign, a sign that Miller surmises was from his 2010 campaign.
11 Additionally, Respondents state that they were not aware of any campaign materials that
12 contained insufficient disclaimers, and provided a screenshot of the Committee's online
13 fundraising website, which contained a proper disclaimer.⁴⁸ The available information suggests
14 that the Committee sent a single email with an inadequate disclaimer, but the mistake was
15 quickly identified and corrected. In addition, the email identified the Committee as the sender
16 and included the Committee's mailing address, thus, recipients had some information as to who

⁴⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985). As to the allegations regarding the use of Restoring Liberty's email list, Respondents state that Miller, not Restoring Liberty, owned the list, and included a sworn affidavit from Miller in support. Respondents state that while the Committee's reports did not reflect an in-kind contribution from Miller for the use of the list, the Committee intends to amend its third quarter 2016 report to reflect. The allegation that the Committee sent an email soliciting contributions "from the Restoring Liberty LLC website" appears to be unsupported, as the email Respondent attached was sent from the address "Joe@JoeForLiberty.com," which was the Committee's website. See Compl. at Ex. H; Resp. at 6. Likewise, Respondents state that the social media accounts the Complaint alleges belonged to Restoring Liberty actually belonged to Miller in his individual capacity, and we have no contrary information. Resp. at 7-8.

⁴⁶ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1).

⁴⁷ 52 U.S.C. § 30104(a); 11 C.F.R. § 104.3.

⁴⁸ Resp. at 11, Ex. C.

1 was responsible for it.⁴⁹ There is no information indicating the Committee's other
2 communications violated the Commission's disclaimer requirements.

3 The reporting allegations appear to be unsupported. The Committee reported the in-kind
4 contributions for the use of Miller's vehicle and campaign headquarters, and although the
5 Complaint alleges that some of those reported amounts were too high, the information does not
6 indicate that those amounts were unreasonable. Additionally, there is no information showing
7 that the Committee inflated the value of any in-kind contribution in order to reimburse Miller for
8 more than its value. Under these circumstances, we recommend that the Commission dismiss the
9 remaining allegations pursuant to its prosecutorial discretion.⁵⁰

10 **IV. RECOMMENDATIONS**

- 11 1. Dismiss the allegations that Joe Miller, Citizens for Joe Miller and Thomas John
12 Nelson in his official capacity as treasurer, and Restoring Liberty, LLC violated the
13 Act pursuant to the Commission's prosecutorial discretion;
- 14 2. Approve the attached Factual and Legal Analysis;
- 15 3. Approve the appropriate letters; and
- 16 4. Close the file.
- 17

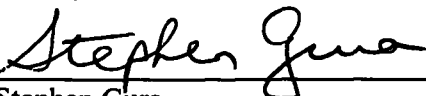
⁴⁹ See Factual & Legal Analysis at 7, MUR 7004 (The 2016 Committee) ("[W]ith respect to the emails lacking full disclaimers, there was sufficient information for recipients to understand that the Committee paid for the emails").

⁵⁰ See *Heckler*, 470 U.S. 821.


Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Associate General Counsel for Enforcement

10.19.17
Date


Stephen Gura
Deputy Associate General Counsel


Lynn Y. Tran
Assistant General Counsel


Derek H. Ross
Attorney

00444444001